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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 6

SECRETARY OF AGRICULTURE OF THE UNITED STATES, APPELLANT

v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION, ET AL.

No. 7

UTAH POULTRY & FARMERS COOPERATIVE, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 11

SECRETARY OF AGRICULTURE OF THE UNITED STATES, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 12

UTAH POULTRY & FARMERS COOPERATIVE, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The majority and dissenting opinions of the specially constituted district court of three judges is reported at 119 F. Supp. 846 (R. 105-144). The

report of the Interstate Commerce Commission, involved herein (R. 11-52), is reported at 284 I.C.C. 377.

JURISDICTION

The final decree of the district court was entered May 7, 1954 (R. 149). The petition for appeal in No. 6 was allowed on May 7, 1954 (R. 150), and the petition for appeal in No. 11 was allowed on June 8, 1954 (R. 159, 160).[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 2101(b). Probable jurisdiction was noted October 14, 1954 (R. 1288).

QUESTIONS PRESENTED

1. The principal question presented is whether tariff provisions approved by the Commission, containing a tolerance rule applicable to damage claims on shell eggs, are limitations of carrier liability which are prohibited by section 20(11) of the Interstate Commerce Act (49 U.S.C. 20(11)) and:

(a) whether shell eggs come within the meaning of the "inherent vice" exception to the strict common carrier liability with respect to loss or damage to property where the carrier is free from negligence and the damage arises solely from the nature and inherent character of the property;

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[1] The appeal taken in No. 6 from the District Court's opinion of March 10, 1954, as a precautionary measure and supplemented by the timely appeal from the final decree, should be dismissed.

2. Another question presented is whether the Commission's decision and order, approving damage tolerances for shell eggs, are supported by adequate findings and substantial evidence?

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act involved are set forth in Appendix A hereto.

STATEMENT

This is a direct appeal from a final judgment of a specially constituted District Court, sustaining a report and order of the Interstate Commerce Commission issued in a proceeding entitled No. 20030, *Special Regulations, Eggs* (R. 11).

The Commission proceeding was instituted on its own motion by an order dated July 23, 1948. The purpose of the proceeding was to conduct an investigation into and concerning the reasonableness and otherwise lawfulness of the special regulations, then in effect,[2] governing the description, marks, inspection and delivery, and the handling of claims thereunder in connection with the interstate transportation of shell eggs, with a view to making findings in the premises and prescribing

[2] These regulations provide in section 6 thereof (R. 49) that:

In connection with shipments of eggs, except storage packed eggs, storage packed dirties, and rehandled and repacked eggs, if not more than five percent (5%) of the eggs are damaged, no claim will be allowed. Where damage exceeds five percent (5%), claims shall be allowed for all damage in excess of five percent (5%) if investigation develops carrier's liability.

reasonable rules, regulations, and practices as the facts and circumstances warranted (R. 65).

The special regulations above referred to (R. 46-49) were included in tariffs which were already on file with the Commission and were contained in Note 5 of Supplement No. 2 to Consolidated Freight Classification No. 18, Agents A. H. Greenly's I.C.C.-O.C. No. 62; Robert E. Boyle's I.C.C. No. 106; Geo. H. Dumas' I.C.C. No. 31; and R. G. Raasch's I.C.C. No. 642 (R. 65).

The regulations in effect prior to July 23, 1948, were approved by the Commission in 1919 (R. 13, 15), section 6 of which is identical to section 6 of the regulations which became effective July 24, 1948 (quoted in footnote 2, *supra*) (R. 43-45).

All common carriers of property by railroad parties to the tariff schedules under investigation were made respondents in the Commission proceedings (R. 13).

Extensive hearings were held before Commissioner Richard F. Mitchell of the Commission, including two hearings at Chicago, Ill., one at Washington, D. C., one at Brooklyn, N. Y., and one at Los Angeles, Calif. At these hearings witnesses for the railroads, the Department of Agriculture, the Defense Department, various egg producing organizations and shippers appeared and introduced voluminous testimony and numerous exhibits. Following the hearings, briefs were filed by counsel representing the various parties to the proceedings.

During the course of the hearings the railroads published tariff schedules (to become effective May 12, 1950), containing new regulations changing in certain respects those then under investigation. Upon protest by the Department of Agriculture, the Department of the Army, and other agencies and organizations, the operation of the new regulations was suspended in Investigation and Suspension Docket No. 5792, entitled *Damage Tolerance on Shell Eggs* (R. 50-52).[3] That docket was consolidated with Docket No. 30030 and both were heard and decided on a common record (R. 12).

Following the hearings a proposed report was prepared and issued by two Commission examiners

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[3] These new regulations filed by the railroads, and suspended by the Commission provide (R. 51):

> Section 6.—On eggs placed in packages at rail point of origin of the shipment, no claim shall be allowed where the physical damage to the eggs at destination does not exceed 4% of the contents of the packages containing damaged eggs. Where damage exceeds 4%, claims shall be allowed for all damage in excess of 4% if investigation develops carrier liability.
>
> Section 7.—On eggs placed in packages at points other than the rail point of origin, no claim shall be allowed where the physical damage to the eggs at destination does not exceed 6% of the contents of the packages containing damaged eggs. Where damage exceeds 6% claims shall be allowed in excess of 6%, if investigation develops carrier liability.

Exceptions to Sections 6 and 7 provide for acceptance of certificates of Federal or State egg inspection agencies showing damages at rail-point of origin, at the amount of damages plus 1 percent, where actual damage shown is other than 3 percent under Section 6, and is other than 5 percent under Section 7.

recommending that the Commission find that the then existing 5 percent tolerance rule on eggs, other than those rehandled and repacked at the rail point of origin, was not shown to be unreasonable or otherwise unlawful, and that the proposed tolerance of 4 percent on eggs packed at the rail point of origin and 6 percent on those packed at other than rail points of origin, had not been justified, but that tolerances of 3 and 5 percent, respectively, would be justified. The examiners also recommended that the railroads should be directed to cancel the suspended schedules without prejudice to the filing of new schedules in conformity with the findings recommended. (R. 1048) Exceptions were filed to the examiners' proposed report and oral argument was heard before the entire Commission. (R. 12)

Thereafter, on February 4, 1952, the report and order of the entire Commission were entered, which discontinued the original proceeding and required the suspended schedules to be cancelled without prejudice to the filing of new schedules in harmony with the findings contained in the report, *viz.*, that tolerances of 3 per cent on shell eggs packed at the rail point of origin, and 5 per cent on those packed at points other than rail points of origin, would be reasonable (R. 43). Petitions for reopening, reconsideration, and reargument were denied by the Commission on May 19, 1952 (R. 79). The railroad respondents then filed schedules, in conformity with the Commission's findings, which constitute the immediate cause of the present controversy. The schedules, which

have been effective since May 2, 1952, provide in pertinent part, as follows (R. 53, 1286-A):

> *Section 6.*—On eggs placed in packages at rail point of origin of shipment, no claim shall be allowed where the physical damage to the eggs at destination does not exceed 3% of the contents of the packages containing damaged eggs. Where damage exceeds 3%, claims shall be allowed for all damage in excess of 3%, if investigation develops carrier liability.
>
> *Exception.*—Where bona fide certificates of Federal or State egg inspection agencies showing extent of physical damage to eggs determined at rail point of origin of the shipment immediately prior to tender for rail transportation indicate the actual shell damage to be other than 2%, the percentage of actual damage as shown on such certificates, plus 1%, shall be used in lieu of 3% specified in this Section.

Section 7 of the tariff is similarly worded except that it applies a 5 percent tolerance to claims on eggs placed in packages at points other than the rail point of origin.

Appellant Utah Poultry & Farmers Cooperative, on January 29, 1953, filed suit against the United States of America and the Interstate Commerce Commission to set aside and annul the Commission's orders herein (R. 1). The Secretary of Agriculture intervened as a plaintiff and with leave of the court other parties also intervened as

plaintiffs (R. 80-82). The Commission filed its answer to plaintiffs' complaints (R. 87, 88) and the railroads, having been permitted to intervene as defendants, filed their joint answer seeking to uphold the Commission's order (R. 102). The United States filed its answer admitting "each and every allegation of the complaint" and praying that the court hold unlawful and set aside the order of the Commission (R. 84, 87). The United States also has joined the appellants in this appeal and seeks to have this Court reverse the decision of the court below and this Court, on October 14, 1954, noted probable jurisdiction (R. 12, 88).

THE REASONS FOR THE COMMISSION'S INVESTIGATION AND THE ACTION TAKEN IN THE CASE

Before entering into a discussion of the validity of the order we shall refer briefly to the reasons which compelled the Commission to conduct an investigation into loss and damage claims on the shipment of shell eggs.

It had come to the attention of the Commission, well in advance of the date of the order entering into the investigation, that claims by shippers for damages to shell eggs transported by the railroads in interstate commerce had increased to startling proportions.[4] The claims had increased, on a na-

[4] The problem of claims against railroads for damages to shipments of eggs had been before the Commission at various times for many years and never satisfactorily solved. *National Poultry, Butter & Egg Assn. v. N.Y.C. R.R.*, 52 I.C.C. 47 (1919).

tionwide basis, from approximately $110,000 in 1941 to $2,338,462 in 1947 (R. 38). Damage claim payments on shell eggs had increased more than 1800 percent since 1939 (R. 27). Such claims in 1947 were found by the Commission to be unusually high in relation to like claims on any other commodity (R. 25, 26). Despite the fact that the egg carload traffic originated in 1947 was only 0.02 percent of all carload traffic the claim payments for damage to eggs amounted to 1.91 percent of all claim payments. (R. 38) The Commission found that in 1947 claims were filed on 58.6 percent of all carloads of shell eggs delivered by railroads at New York, Philadelphia, Baltimore and Boston and, that over 50 percent of the total revenue accruing to the railroads on shipments of shell eggs to New York in 1947, was paid in damage claims on those shipments (R. 22-24).[5]

The railroads had tried to bring about improvement of the egg damage claim situation but had not been successful. They had conducted numerous experiments in packing, loading and handling but no practical method had been discovered as to how the damage found to exist in the egg cases at destination could be materially reduced. (R. 28, 29)

It readily will be apparent to the Court that the Commission was faced with the necessity of find-

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[5] The relative importance of New York as an egg market is revealed by the fact that it receives annually 6 million cases, as compared with 5 million at Chicago, the next largest market and one million each at Philadelphia, Boston, San Francisco, Los Angeles and Detroit, Mich. (R. 39).

ing a solution, if possible, to this very serious and difficult problem. That solution must be found, if at all, within the framework of the Interstate Commerce Act. The Commission could not avoid or evade its responsibility in a matter as important as this in view of the National Transportation Policy enunciated by Congress to "foster sound economic conditions in transportation and among the several carriers * * * to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the National defense." It hardly would be possible for the Commission to implement that policy unless it could approve a plan such as the tolerance rule here involved which "is consonant both with the needs of commerce and the demands of justice". *Luckenbach v. McCahan Sugar Co.*, 248 U.S. 139, 149.

It is respectfully submitted that the farmers and the poultry interests, the consumers, and all those in the various segments of our economy, have a vital interest in maintaining and preserving an adequate national transportation system. The Commission must consider all those interests and in accordance with its best judgment and in conformity with the law and the evidence determine what would be reasonable and just in the premises. In doing so the Commission could not, any more than the courts can, give any greater weight and consideration to the claims of the Department

of Agriculture, Department of the Army or the Department of Justice than to the claims of the other parties participating in this case. The Court below so held and further stated that "The Attorney General does not have authority to 'confess error' and thereby to dispose of the case." (R. 106-107). See *Interstate Commerce Commission v. Jersey City, et al.*, 322 U.S. 503, 523.

SUMMARY OF ARGUMENT

I

The order approving a tolerance rule applicable to damage claims on interstate shipments of shell eggs, by railroads, is within the authority conferred upon the Commission by the Interstate Commerce Act, 49 U.S.C., National Transportation Policy, preceding Sections 1, 301, 901, 1001; Sections 1(6); 6(1) 13(2); 15(1); and 20(11).[6]

The Commission has been given broad power under the Interstate Commerce Act to regulate interstate transportation. The restraint imposed by Section 20(11) of the Act is narrowly limited. The clause in this section which limits carrier liability for loss or damage "caused by it" is to be strictly construed. There is no requirement of the Act or the common law which makes a carrier liable for damages not "caused by it" when, as here, the damage is due to "uncontrollable forces." Common carriers, under the common law, had the right to make and enforce reasonable rules and regulations governing the conduct of their business. *Platt* v.

[6] Set out in Appendix A hereto.

Lecocq, 158 F. 723, 730-731; *United States* v. *Oregon Nav. Co.*, 159 F. 975, 979; *York Company* v. *Central Railroad*, 3 Wallace 107, 112 (70 U.S.)

The Commission's approval of the tolerance rule or regulation is not predicated on a limitation of carrier liability but rather upon the "inherent vice or nature" of the commodity. The regulations merely constitute tariff rules and practices designed to prohibit the railroads from paying claims for damages which are not attributable to their negligence but which result from the inherent nature of the commodity transported. The order does not in any way limit the liability of the rail carriers for damages caused by them.

II

Substantial evidence supports the order and findings upon which it rests. The evidence overwhelmingly supports the Commission's finding that shell eggs are highly perishable and fragile and, therefore, susceptible to damage. Also, that it is not possible to handle eggs without causing some damage to the shell. Based upon special studies made by appellant Department of Agriculture it is shown that there is a tolerance in the grading of eggs because it is not humanly possible to remove from any lot of eggs, even in the handling or grading process, all that are defective; also, that there is a normal expectancy of shell damage in every car that is loaded, and that a checked egg is a potentially dangerous and risky egg from a transpor-

tation standpoint. (R. 342-343, 346, 351, 241 (Pl. Exs. 22-23; R. 1127-1136). The evidence shows that the normal expectancy of damage starts at the nest, and dependent upon the strength of the shell, continues progressively until the egg is used by the consumer (R. 241).

The evidence supports the Commission's finding that a tolerance rule of 5 percent on eggs rehandled or repacked at points other than rail points of origin, and of 3 per cent tolerance at rail point of origin, has been justified and would be reasonable. The evidence shows that on the basis of studies made by the Department of Agriculture at the request of the Commission (R. 365) 4 per cent of the eggs as delivered by producers and sold to the first buyers are in "checked" condition (shell cracked but membrane unbroken), and that an additional 1 percent becomes checked while traveling from the first buyer to the second buyer; that on midwestern eggs, arriving at the car-lot assemblers plant in midwestern states, or on reaching the wholesalers in the northeast, approximately 5 percent would be in a checked condition; and that in addition to this 5 per cent, there were approximately 12 percent more of the eggs which were stained and dirty (R. 371).

Based on a careful inspection by sampling cases of eggs contained in carload shipments, immediately prior to loading in railway cars at points of

origin, and a re-inspection of the identical cases at destination, the evidence showed that there was a total of 1.7 percent more damage found in the cases at destination than at rail origin, which damage is due to the inherent nature of the eggs. This evidence supports the finding that 1 percent of the eggs was damaged during rail transportation due to their inherent nature which formed the basis of the Commission's approval of the tariff rule providing that where bona fide certificates of Federal and State inspection agencies, showing the extent of actual damages determined at rail origins, there will be added to such damage 1 percent to cover damage in transit due to their inherent nature.

The contention that the tolerance regulation approved by the Commission is nationwide in its application, while the evidence presented related largely to the damage claims in official territory, particularly in the New York City area, does not affect the validity of the order, for the reason that a shipper whose eggs are not damaged suffers no injury. The evidence shows that most of the damage to the eggs already exists at origin before they are received by the railroads. Therefore, the damage is there irrespective of the destination of the shipment. In any event expert witnesses for the Department of Agriculture testified that the studies made by that Department included not only carload shipments of eggs from the Midwest and the South, but also covered 737 cars from all parts of the country.

III

The practice of applying a tolerance rule on shipments of freight is not new. The Commission approved, as early as January 12, 1919, a tolerance rule in connection with damage claims on eggs, which was the same kind of a rule as applied here, and it remained in effect for more than a third of a century without being attacked. Even before that the Commission approved tariff rules with respect to grain allowing for deductions from damage claims certain percentages for loss due to natural shrinkage. Since then there have been thousands of tariffs filed with the Commission providing for tolerances on various commodities for the purpose of adjusting claims for loss due to weight inaccuracies, moisture, evaporation, precipitation, and natural shrinkage attributable to the inherent nature of the commodity.

IV

The Department of Agriculture and the Department of the Army have adopted tolerance rules in the grading of eggs and have recognized that due to the inherent nature of this commodity, there is a normal expectancy of shell damages not only in the grading and packing of eggs but also in their transportation. An expert witness for the Department of Agriculture testified that he was "very definitely" of the opinion that there should be a tolerance on shell eggs shipped into New York. (R. 357).

V

The courts have approved tolerance rules on shipments of various commodities as a method of removing from claims such damages as are not attributable to the carriers but arise due to the inherent nature of the commodity transported. *Leonard* v. *Pennsylvania R. Co.*, 15 F. Supp. 55; *Bronstein* v. *Baltimore & O. R. Co.*, 29 F. Supp. 837, 839, *Mitzer* v. *Pennsylvania R. Co.*, Ibid 840, 842-843; *National Distillers Products Corp.* v. *Companhia Nacional*, etc. 107 F. Supp. 65, 70.

ARGUMENT

I

The Commission's Order Approving a Tolerance Rule Applicable to Damage Claims on Interstate Shipments of Shell Eggs Is Within Its Statutory Authority and Is Not Violative of Section 20(11) of the Interstate Commerce Act

The court below found, and correctly so, that the Commission's action in approving a tolerance regulation applicable to shell eggs is within the congressional grant of authority. Congress has given to the Commission broad power to regulate all modes of transportation subject to the Act, and in its administration thereof it is required to recognize and preserve the inherent advantages of each with a view of fostering sound economic conditions in transportation among the several carriers (see National Transportation Policy, 49 U. S. C., preceding sections 1, 301, 901 and 1001). As also pointed out by the court below, Congress has imposed a re-

straint upon the railroads and upon the Commission alike under Section 20(11) of the Act which is narrowly limited. The clause in this section which limits carrier liability for loss or damage "caused by it" must be strictly construed.

The legislative scheme approved by Congress requires, Section 1(6), that the carriers in the first instance must establish, observe and enforce "just and reasonable classifications of property for transportation * * * and just and reasonable regulations and practices affecting classifications, rates, or tariffs"; Section 6(1) requires railroads to publish tariff schedules including any rules or regulations which in any wise change, affect, or determine any part or the aggregate of the rates or charges, or the value of the service rendered; and Section 15(1) authorizes the Commission, after full hearing upon a complaint, or on its own initiative, to determine whether any "regulation or practice" of any such carrier "is or will be unjust or unreasonable" or otherwise in violation of the Act. If the Commission so finds it is authorized "to determine and prescribe what will be the just and reasonable * * * regulation, or practice" thereafter to be followed.

There has been no deviation from the statutory provisions applicable to the proceedings in this case.

The question presented is one involving the jurisdiction of the Commission to determine whether a regulation or practice is reasonable and how this is affected by the interpretation of Section 20(11) of the Act, particularly the clause which

prohibits limitations of a carrier's liability for the full actual loss, damage, or injury to such property, "caused by it."

Section 20(11) of the Act constitutes the Carmack Amendment, enacted as part of the Hepburn Act of June 29, 1906 (34 Stat. 584, c. 3591), as amended by the first Cummins Amendment of March 4, 1915 (38 Stat. 1196, c. 176), the second Cummins Amendment of August 9, 1916 (c. 301, 39 Stat. 441) and includes several other amendments not important to the matters involved in this appeal.[7]

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[7] Prior to the Carmack Amendment, the rule of carrier liability, as enforced in both Federal and State courts, was either that of the general common law, as declared by this Court and enforced in the Federal Courts; or that determined by the supposed public policy of a particular state; or that prescribed by a state statute. *Adams Express Co. v. Croninger*, 226 U.S. 491, 504.

The Carmack Amendment enacted as part of the Hepburn Act of June 29, 1906, 34 Stat. 593, providing that no contract, receipt, rule or regulation should exempt a carrier from the liability thereby imposed, was brought about, in part at least, by the conflict in the decisions of the courts as to the extent of the liability of the initial carrier and the inconvenience to which shippers were subjected in proceeding against an intermediate or delivering carrier. This amendment did not forbid a carrier from limiting its liability to an agreed value made to adjust the rates. *Chicago, B. & Q. Ry. Co. v. Miller*, 226 U.S. 513. This Court held in *Missouri, K. & T. Ry. Co. v. Harriman Bros.*, 227 U.S. 657, that the liability imposed by the Carmack Amendment was that imposed by the common law, which could be limited or qualified by special contract, provided the limitation or qualification was just and reasonable, and did not exempt a carrier from loss or responsibility due to its negligence.

The first Cummins Amendment of March 4, 1915, 38 Stat. 1196-7, which amended the Carmack Amendment, made the

Within a short time after the first Cummins Amendment became effective the Commission was called upon to interpret its provisions in view of the many widely varying or diametrically opposed ideas expressed as to its effect. Following formal hearings conducted by the Commission on the subject a report was published in *The Cummins Amendment*, 33 I. C. C. 682, in which the Commission gave its interpretation of the amendment.

In speaking of its provisions the Commission stated, page 691, that it seemed clear that they were confined to "instances of loss, damage, or injury caused by the carriers." At page 693, it further stated that this amendment "clearly places upon the carriers liability for the full actual loss, damage, or injury to the property transported *which is*

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carrier liable for the full actual loss of property shipped, when caused by the carrier, regardless of any agreement or representation of the shipper, and had the effect of nullifying the whole system of released rates. *Adams Express Co.* v. *Darden*, 265 U.S. 265, 266.

The purpose of the second Cummins Amendment (Aug. 9, 1916, 39 Stat. 441) was to make the carrier assume full liability as it existed prior to the Carmack Amendment of 1906, so that when property was lost or damaged in the course of transportation under such circumstances as to make the carrier liable, recovery may be had for the full value, or on the basis of full value. (*Express Rates, Practices, Accounts, and Revenues*, 43 I.C.C. 510). It had the effect of permitting limitation of liability, or of the amount of recovery, and the establishment and maintenance under prescribed conditions, of rates dependent upon values declared by the shipper, or agreed upon in writing as released value. *Bills of Lading*, 52 I.C.C. 671.

The history of and various amendments to the Cummins Amendment is reviewed by this Court in *New York, N.H. & H. R. Co.* v. *Nothnagle*, 346 U.S. 128.

caused by them and it makes unlawful *any limitation of that liability, or of the amount of recovery thereunder.*" (Emphasis supplied.)

The Commission further stated (page 695) that after the effective date of the Cummins amendment:

> * * * A carrier * * * may not contract to limit its liability for loss or damage caused by it to the property. There is, however, no inhibition as to the limitation of the liability of a carrier for losses not caused by it or a succeeding carrier to which the property may be delivered. The amendment has expressly reapplied the limitation of the prior act with respect to loss or damage caused by the carriers chargeable therewith. It follows, therefore, that the interpretation applied to the act before it was amended is equally applicable to the amendment in so far as the latter affects the right of a carrier to establish rates conditional upon the shipper's assumption of the entire risk of loss attributable to causes beyond the carrier's control. From this it follows that, under the amendment a contract or a tariff may lawfully limit to a reasonable maximum the liability of a carrier for losses which it does not cause. * * *

The Commission had earlier made an interpretation of the Carmack Amendment of the Hepburn Act with respect to carrier liability "for any loss, damage, or injury to such property caused by it,"

in the case entitled *Released Rates*, 13 I. C. C. 550 (1908),[8] wherein it stated (p. 552) that:

> * * * The scope of this prohibition must turn largely upon the construction to be placed upon the word "caused." The word "caused" is not susceptible of a narrow interpretation—it is broad enough to comprehend all losses due to the carrier's misconduct, whether positive or negative in character. But it can not possibly be extended to cover losses due to causes beyond the carrier's control. We are necessarily driven to the conclusion, therefore, that the law places no restriction upon the carrier's efforts to exempt itself from liability for losses which occur without fault on its part. We are of opinion, in short, that in the absence of agreement or notice the carrier's liability is governed by the ordinary common-law rule; but that a stipulation for exemption from liability for losses due to causes beyond the carrier's control is open to no legal objection.

In *Crouch Grain Co.* v. *A., T. & S. F. Ry. Co.*, 41 I. C. C. 717 (1916), the Commission, relying upon its decision in the *Released Rates* case, stated that the rule fixing an amount of tolerance for the natural shrinkage of grain does not violate the inhibition clause of the statute. Furthermore, the Commission said, "the law in this respect was not altered by the so-called Cummins amendment" and

[8] This case was cited with approval by this Court in *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 512.

that a tariff rule published by a carrier providing for a tolerance on grain fixing "liability to losses actually caused by it," is not violative of the act to regulate commerce, or any amendment thereof (p. 718). This decision was based on the finding in the case that the limitation of the rule "is not against losses caused by the carrier or its connections, but rather against liability for losses due to the inherent nature of the commodities themselves and attributable to no human agency." (pp. 717-718).

As we have already shown, the Carmack amendment of June 29, 1906, made the initial carrier "liable for any loss, damage, or injury to such property caused by it," which is the identical language contained in the Cummins amendments heretofore discussed and embodied in Section 20(11) as it stands today. In its interpretation of the Carmack amendment in *Adams Express Co. v. Croninger*, 226 U. S. 491, this Court, in speaking of the liability imposed upon a carrier by that act, stated (pp. 506-507) that:

> * * * It is a liability to any holder of the bill of lading which the primary carrier is required to issue "for any loss, damage or injury to such property caused by it," or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage or injury, from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage though due to

uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words, "any loss or damage," would be to ignore the qualifying words, "caused by it." The liability thus imposed is limited to "any loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered;" and plainly implies a liability for some default in its common law duty as a common carrier.

We desire to point out that the Commission does not claim that the Cummins amendment, contained in Section 20(11) as it presently stands, changed the common law rule in regard to proof of negligence in establishing carrier liability. (*Chesapeake & Ohio Ry. Co.* v. *Thompson Mfg. Co.*, 270 U.S. 416, 422.) Even under the common law, carriers were not absolute insurers and there never was a rule under the common law that made a common carrier liable in damage to property which existed at the time it was tendered to and received by the carrier for transportation (concealed damages) or which became damaged in transit due to its inherent nature. The rule under the common law specifically exempts a carrier for loss resulting from the inherent nature or vice of the property transported. The Commission's order here involved does not permit the carriers to avoid liability for loss caused by the carriers, but merely prevents them from being responsible for damage which they do not cause and which occurs due to one of the exemptions of the common law rule.

In *Chesapeake & Ohio Ry. Co. v. Thompson Mfg. Co., supra*, the shipper, in support of its claim for damages under the Cummins amendment, argued that every carrier receiving goods for carriage in good condition, and delivering them in bad condition is conclusively presumed to have been negligent and is liable for the damages resulting from its negligence, unless the injury was caused by an act of God, the public enemy, or the nature of the goods themselves; and that as the evidence did not show the damage was due to one of the excepted causes the carrier's negligence was to be conclusively presumed.

In regard to this argument, this Court stated (pp. 421-423) that:

> It is sometimes said that the basis of the carrier's liability for loss of goods or for their damage in transit is "presumed negligence." *Hall & Long v. Railroad Companies*, 13 Wall. 367, 372. But the so-called presumption is not a true presumption, since it cannot be rebutted, and the statement itself is only another way of stating the rule of substantive law that a carrier is liable for a failure to transport safely goods intrusted to its care, unless the loss or damage was due to one of the specified causes. [Citing cases.]
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> The respondent therefore had the burden of proving the carrier's negligence as one of the facts essential to recovery. When he in-

troduced evidence to show delivery of the shipment to the carrier in good condition and its delivery to the consignee in bad condition, the petitioner became subject to the rule applicable to all bailees, that such evidence makes out a *prima facie* case of negligence. *Miles* v. *International Hotel Co.*, 289 Ill. 320; *Miller* v. *Miloslowsky*, 153 Ia. 135; *Dinsmore* v. *Abbott*, 89 Me. 373; *Railroad Co.* v. *Hughes*, 94 Miss. 242, 246; *Hildebrand* v. *Carroll*, 106 Wis. 324. The effect of the respondent's evidence was, we think, to make a *prima facie* case for the jury. See *Sweeney* v. *Irving*, 228 U.S. 233; *Haines* v. *Shapiro*, 168 N.C. 34, 35; *Sims* v. *Roy*, 4 App. D.C. 496, 499. But even if this "*prima facie* case" be regarded as sufficient, in the absence of rebutting evidence, to entitle the plaintiff to a verdict (*Buskwell* v. *Fuller*, 89 Me. 600, 602, 603; *Cogdell* v. *Railroad*, 132 N.C. 852) the trial court erred here in deciding the issue of negligence in favor of the plaintiff as a matter of law. For the petitioner introduced evidence of the condition of the cars from the time of shipment to the time of arrival, which persuasively intended to exclude the possibility of negligence.

The instant case is even stronger than that case for the reason the stoves there delivered to the carrier were in good condition. In the instant case, eggs are in a damaged condition when delivered to the carrier due to their inherent nature. The tolerance rule here is the only practical way of eliminat-

ing claims for damages for which the railroads are not liable. The rule would avoid a multiplicity of suits and avoid a lack of uniformity of court decisions in such cases.

It thus would appear that the holdings of this Court are to the effect that despite the common law rule making common carriers liable as insurers, except in one of the specified causes, such rule does not include damage that exists to the goods prior to time the carrier receives them (concealed damages) or that which occurs during the course of transportation due to the inherent nature of the goods. The court below, in dealing with this situation, held (R. 125):

> The restraint imposed upon the carriers and the Commission by Section 20(11) of the Act is not broad, but is in terms narrowly limited. That section refers to carrier liability for any loss, damage or injury, "caused by it." Neither the Act nor the common law makes the carrier liable for damage which it does not cause. A statute which purported to do so would present serious constitutional questions. The liability which the carriers and the Commission are forbidden by Section 20(11) to limit is a liability for damage caused by the carrier.
>
> Hence, on the one hand power is granted the carriers and Commission in the broadest terms, while on the other hand the restraint upon their power is couched in carefully restricted language.

> To deny the Commission authority to do what it here has done is to drop out of Section 20(11) of the Act, the restrictive language "caused by it" and to limit the broad grant of powers which the United States Supreme Court consistently has recognized that the Commission possesses. To strike the tolerance regulation down requires us to go a long way. Surely it is hardly to be said consistent with well accepted principles of statutory construction.

The legislative history of the Act reveals no intent by Congress to make carriers liable for inherent vice in goods shipped.[2]

The Commission approved tolerance rules for application to damage claims to eggs, similar to

[2] A study of the legislative history of the Act reveals that it was the object of Congress in enacting the Cummins Amendment to make carriers engaged in interstate commerce liable for the actual loss, damage, or injury to such property *caused by them*. Senate Report No. 407, 63d Cong., 2d Sess., Act approved March 4, 1915, (Public No. 325, 63d Cong.)

During the debate on what ultimately became the "Cummins Amendment" of March 4, 1915, 38 Stat. L. 1196, it was proposed by Senator Smith of Georgia that the word "caused" [by it] be deleted and the word "transported" substituted in lieu thereof. Senator Sutherland thought the change unwise because it would "extend the liability of the carrier to the cases which were excepted by the common law; that is, the carrier under that sort of an amendment would be liable for " " " inherent defects of the goods, and those things recognized by the common law as constituting exceptions to its liability." (51 Cong. Rec. 9778.) Thereupon, Senator Smith withdrew his proposed amendment. This clearly indicates the attitude of the senate not to make carriers liable for inherent defects in goods shipped.

those here in question; more than 30 years prior to the proceedings herein. They were never questioned in court. Acceptance of such rules and regulations for so long a period of time would seem to constitute a concession on the part of appellants that the rules are not violative of Section 20(11).

It is, therefore, respectfully submitted that the Commission's interpretation of the statute in this respect for over a third of a century is a reasonable one which should not be overturned lightly. It has repeatedly been held that the interpretation of an act by the agency charged with its enforcement is entitled to great weight. See, for example, *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 549; *United States* v. *Missouri Pacific R. Co.*, 278 U.S. 269, 280; *United States* v. *Alabama R. Co.*, 142 U.S. 615.

From the foregoing it is believed clear that the tolerance rule here involved does not violate Section 20(11) of the Act or any other applicable statute.

II

The Commission's Finding That the Tolerance Regulations Under Review Are Merely Tariff Rules and Practices Designed to Prohibit Carriers From Paying Claims on Eggs Which Were in a Damaged Condition at the Time They Were Received by the Carriers for Transportation, Is Supported by Substantial Evidence

The Commission found (R. 18-19) that the railroads are "not attempting by the proposed regulations to limit carrier liability", since "they are directed against loss due to the inherent nature

of shell eggs", and that the regulations "constitute merely tariff rules and 'practices' designed to prohibit the carriers from paying claims for damage which are not attributable to their negligence but which result from the inherent nature of the commodity transported." (R. 40.)

It is, therefore, perfectly obvious to any one reading the report that the Commission's approval of the tolerance rule, here involved, is predicated on the "inherent vice or nature" of the eggs rather than on a limitation of common carrier liability. Since this issue of this case is deeply rooted in facts, it is believed necessary to refer to the testimony of witnesses taken at the hearings, which shows that the eggs here involved come within the inherent vice rule of the common law.

The evidence, as we shall see, shows that the regulations do not exempt the carriers from any damage for which they would be liable under the provisions of Section 20(11) of the Act, or under the common law.

The evidence of record presented by the witnesses for the railroads (R. 241, 261) and the Department of Agriculture (R. 362) proves conclusively that eggs are highly perishable and fragile and, therefore, susceptible to damage.

Furthermore, the evidence is uncontroverted that it is not possible to handle eggs without causing some damage to the shell (R. 262). The chief of the Dairy & Poultry Inspection and Grading Division, Production and Marketing Administration, United States Department of Agriculture,

testified it was "humanly impossible" to pack a case of 100 percent sound eggs, and that, based on 27 years experience in the handling of eggs he had never seen a perfect car (R. 343, 346).

Also because of the fragile nature of shell eggs and their susceptibility to damage in handling, this witness testified that "There is a tolerance in the grading of eggs, * * * because it is not humanly possible to remove from any lot of eggs in the candling or grading process, all defective eggs," including cracked eggs. (R. 342). Thus, the United States Department of Agriculture has prescribed tolerance rules in the grading of eggs.[10]

The witness also testified that there is a normal expectancy of shell damage in every car that is loaded with eggs (R. 346), and that a checked egg is a potentially risky egg from a transportation standpoint (R. 351).

This same witness stated that he "very definitely" thought that there should be a tolerance placed on shell eggs shipped into New York (R. 357). He further stated (R. 345) that under the rule then in effect in New York, which allows a consignee to examine 20 cases of eggs and if a single egg is found to be cracked, in any one of the 20, then a check may be made of the whole car,

[10] The tolerance prescribed (Pl. Exs. 20 and 21, R. 1122-1125) allows 7.5 percent on grade AA eggs; 11.7 percent on Grade A, and similar tolerances on grades B and C eggs. The witness testified that under the Department's rules on tolerance he would permit the packing of cracked eggs in cases within the tolerance allowed for the particular grade (R. 345). The tolerances "are set up primarily for the purposes of making allowance for human error" and apply to eggs at the retail level (R. 342-343).

was a "very impractical approach" to the egg damage problem (R. 345, 356).[11]

The Chief of the Research Division of the Poultry Branch, Production and Marketing Administration of the Department of Agriculture in testifying from two studies (Ft. Exhibits 22 and 23; R. 1127-1136), compiled by that Department pursuant to a request from the Interstate Commerce Commission (R. 362, 369) for data that would be helpful in reaching a conclusion as to the very problem involved in the instant case, stated that approximately 1 per cent of the eggs as delivered by producers and sold to the first buyers are in "checked condition" (shell cracked but membrane unbroken) and that an additional 1 per cent became checked while traveling from the first buyer to the second buyer. Further, he said that on Midwestern eggs, arriving at the car lot assembler's plant in Midwestern States or on reaching the wholesalers in the Northeast, approximately 5 per cent of them would be in a checked condition (R. 365). He also stated that in addition to this 5 per cent there were approximately 12 per cent more of the eggs which were stained and dirty (R. 371).

Further testifying this witness stated that the eggs are reworked and repacked at the packer's plant and that when they leave the shipping plant they show that 3.3 per cent were in a checked and stained or dirty condition (R. 371). These figures

[11] Another witness for the Department testified (R. 651) that "If the railroad did not create the damage they should not be called upon to pay it."

were based upon the Department's study of eggs shipped in railroad cars from midwestern shipping points to coastal destination points in 1948. The study included a careful inspection of 115 carloads, made at points of origin "as they were to be loaded into railway cars." (R. 363). The results of the study showed that the shell damage to the eggs, prior to rail movement, was 1.9 percent checks, 1.4 percent stains and dirties, and 0.1 percent loss, a total of 3.4 percent damage, or "3.4 [percent] normal expectancy." (R. 371).[12] The 115 cars referred to were delivered to points on the

[12] The witness stated that the 115 sample cars thus inspected were marked at the point of inspection (point of rail origin) and the same cases and the same eggs were reinspected at destination (R. 363). The results of the reinspection of the cases at destination showed that instead of containing 1.4 percent stains and dirties, 1.9 percent checks, and 0.1 percent loss (as when loaded into the cars at the rail origin point), they contained 2.1 percent stains and dirties, 2.7 percent checks, and 0.3 percent loss, or a difference of 0.7 stains and dirties, 0.8 percent checks, and 0.2 percent loss, or a combined total of 1.7 percent damage attributable to rail transportation of which 1.5 percent was for checks and stains and dirty eggs. (Pl. Ex. 22; R. 1130).

The examination of eggs at origin and destination consisted of a "complete candling at both points." The tests were conducted by qualified Department of Agriculture inspectors. The cases examined were those which were "in apparent good order at destination." (R. 474). The witness stated that the results of the inspection of the 115 cars, above shown, are "supported by approximately 8,000 additional cars," all of which were "rail tests." (R. 475). In expressing confidence in the damage percentages shown as to the 115 cars, the witness referred to 737 cars on which inspection reports had been made which agreed with the findings on the 115 cars, and then stated: "That gives me confidence to a certain extent that the figures on the 115 cars are rather representative." (R. 364).

east, Gulf, and west coasts, including 12 cars which were delivered to New York City. (R. 363, 475).

The study made by the Department of Agriculture of the 115 cars dealt with origins of shipments in the midwestern states. However, another study was made by it with respect to shipments of eggs from all parts of the country. (Pl. Ex. 22, R. 1129, 370.) This study covered 737 cars and shows that checked eggs at origin averaged 1.9 percent, stains and dirties 1.8 percent and loss 0.2 or a total of 3.9 percent. The witness stated that he believed that the studies conducted would be typical of egg production in the entire country, and that the studies show there is a "normal expectancy" of 3.4 percent (R. 371).[13]

The evidence introduced by the railroads in the Commission proceedings, based on studies conducted by them of the nature and extent of damages to shell eggs at the point of origin of the rail shipments in Indiana, showed that inspections which they made of 74 cars in 1947 and of 30 cars in 1948, contained 2.2 and 3.2 percentage of damage respectively and that on 22 cars inspected between December 4, 1948 and February 2, 1949, the per-

[13] The witness for the Department, Mr. Henry G. F. Hamann, immediately preceding this witness, also testified that there is a normal expectancy of shell damage in every car that is loaded with eggs (R. 346). Mr. Hamann also testified that approximately 10 percent of all eggs produced in the United States are graded by the Department (R. 331), and that the certificates issued by the Department at the time of the grading reveal that there is a normal expectancy of shell damage at origin (R. 346).

centage of damage discovered amounted to 2.8 percent. The study further revealed that the percentage of damage found in cars inspected in Iowa during 1947 and 1948 amounted to 2.57 and 2.46 percent, respectively, while the damage found in cars inspected in Minnesota during the same two-year period amounted to 1.81 and 3.84 percent, respectively. (R. 240).[14]

In corroboration of its own findings that there exists at the rail shipping point shell damage of one kind or another in every car loaded with eggs, the railroad witness testified that a "recent" analysis of 1002 inspection certificates of the Department of Agriculture, reporting results of their inspections made at the shipping point, showed that of the 18,437 cases of eggs shipped in the 1002 cars, examined by the Department, that 3.04 percent of the natural eggs were found to be "checked and/or stained", and 3.22 percent of the processed eggs were found to be "cracked and/or stained" before rail transportation started (R. 240).

In his testimony regarding the damages to eggs before the rail movement commences, the railroad

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[14] An additional study was made by an agency of the railroads at shipping point in Iowa, during the period April 19 to June 30, 1949. This study consisted of an inspection of 15 cases of eggs out of each of 60 cars, containing from 400 to 600 cases, after they had been placed in the car at rail point of origin or while they were on the platform before being loaded in the car, and the examination of 100 eggs from each case. This study disclosed a total of 2,256 checked eggs, 483 stained and dirty eggs and 98 broken eggs, or a total of 2.61 percent. (R. 302). The examination of the eggs was by candling. (R. 303).

witness testified that the shell damage was due either to the fragile nature of the eggs, or to the handling in the candling and repacking operations, or to the handling of the cases incident to the loading of the car (R. 241). He said that a certain amount of shell damage is inescapable, and that this "normal expectancy of damage starts at the nest and, dependent upon the strength of the individual shell, continues progressively until the egg is used by the consumer". (*Ibid.*)

From the foregoing evidence, including that contained in the studies made and introduced by the Department of Agriculture, the Commission was warranted in making the finding that "eggs are highly perishable and fragile"; that the "principal cause to which shell damage prior to rail transportation is attributable is the fragility of the commodity" (R. 26); that eggs containing checks are "to a certain extent in a damaged condition", in that they are "defective or cracked"; that the "slightest movement in transportation may cause additional damage * * * which cannot be imputed to negligence of the carrier but rather to the inherent nature of the commodity"; that there is a "normal expectancy of shell damage in every car loaded with eggs; and that it is at least impractical to load a perfect car. (R. 32).[15]

[15] The Commission found from the evidence presented by the Department of Agriculture that of the eggs delivered at the packing plants, 5 percent of them contained checks, and after repacking and as loaded into the rail car they contain 4.9 percent checks (R. 31). It also found that the normal expectancy of shell damage to eggs occurring in rail transit

The tolerance regulations approved by the Commission in this case are tariff rules which relieve carriers from having to pay damages which they do not cause and which arise solely because of the inherent nature of the commodity transported. The question thus presented is one of fact upon which the Commission's findings will not be disturbed by the courts if supported by substantial evidence. *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U.S. 541, 547; *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, 665; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286.

With respect to the appellants' contention that the findings are not supported by substantial evidence on the record as a whole, it is respectfully submitted that this contention is wholly without foundation. From the foregoing discussion it will be seen that the uncontroverted evidence of record shows that shell eggs are highly perishable and fragile and susceptible to damage in handling (R. 241), and that it is not possible to handle them without causing some damage to the shell; also that it is not possible to remove from any lot of eggs, even in the candling or in grading process, all defective eggs (R.342) that checked eggs absorb moisture and the check or crack will widen with the

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from the midwest to New York, amounts to 17 percent as revealed by origin and destination inspections of the same egg cases. Also that similar inspections in 1948 of 737 carloads of eggs loaded at origin points throughout the entire country showed an average percentage of 19 checks, 18 dirties and 0.2 loss. (*Ibid.*)

passing of time (R. 346); that it is not humanly possible to pack a case of 100 percent sound eggs (R. 343, 349); that a checked egg is a potentially risky egg from a transportation standpoint (R. 351); that over 1 percent of additional damage occurs during the course of rail transportation due to their inherent nature (R. 363, Ex. 22, R. 1129-1130); that a certain amount of shell damage is inescapable, and this "normal expectancy" starts at the nest and, dependent upon the strength of the individual shell, continues progressively until the egg is used by the consumer (R. 211).

In regard to the contention of appellants that the damages to shipment of eggs resulted from the negligent handling by the railroads and not from the "inherent vice or the nature of the goods," the Commission's findings and the order entered in the proceedings do not in any way limit the liability of the carriers for any damages caused by them. The court below found that the Commission "does not base its approval of the tolerance rule, in whole or in part, upon any kind of limitation of carrier liability, but on the contrary, bases that approval upon a finding of fact that the regulations 'are directed against losses due to the inherent nature of shell eggs *rather than against losses caused by the carriers*.'"

In view of the above further discussion of the evidence as to damage caused by the carriers is not deemed necessary.

111

The Railroads, With Commission Approval, for a Number of Years Have Provided Tolerance Rules in Tariffs, Serving as a Basis for Determining Either the Amount of Freight Charges to Be Collected or the Loss or Damage Resulting From Weighing Inaccuracies as Well as Natural Causes

The question of tolerance, as applied to transportation, is not new to the industry or to the Commission. Tolerance rules providing for the loss in transit of a fixed amount for the natural shrinkage of grain, in connection with the adjustment of claims for such loss, was approved by the Commission as early as 1915 in *Crouch Grain Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 36 I.C.C. 265. In that case the Commission approved tariffs of the railroads allowing deductions from claims for loss from natural shrinkage of 1/8 of 1 percent on wheat, flaxseed, rye, oats and barley, and 1/4 of 1 percent on corn. The Commission affirmed this approval on reconsideration in 41 I.C.C. 717.

In *Weight Tolerance Rule*, 192 I.C.C. 71 (1933), the Commission approved a railroad tariff providing for a tolerance for uniform application throughout the United States on all carload traffic, minimum of 500 pounds (no change was made in the then existing weighing rules and practices with respect to lumber, grain, seeds, hay, straw and screenings) of 1 percent, except on certain commodities loaded in open cars on which a tolerance was permitted of 1-1/2 percent. This tolerance was approved for the purpose of correcting inac-

curacies of weight upon which freight charges were assessed.[16] The Commission pointed out that the 1 percent tolerance on freight not subject to moisture changes was then in effect throughout the country and that there had never been any substantial complaint against it, except on coal in the Middle West. As to coal, it found a higher tolerance was justified, as well as on other open car freight, which is subject to substantial changes in weight due to evaporation or precipitation. The Commission further found that a tolerance of 1.5 percent or more applied at that time on two-thirds of the coal shipped throughout the country (pages 72-73). See also *Enel Sales Corp. v. Delaware, L. & W. R. Co.*, 225 I.C.C. 288.

There are thousands of tariffs on file with the Commission containing regulations providing for tolerances of various percentages applicable on numerous commodities, including grain, coal, seeds, hay, straw, brick, livestock, gasoline, and carload freight. The tolerances provided in such

[16] The Commission made an investigation of this subject in 1917 and issued a report (28 I.C.C. 7) as a result of which a code of rules governing the weighing and reweighing of carload freight was prepared and adopted by the American Railway Association and approved by the National Industrial Traffic League. The code was indorsed by the Commission and adopted by the carriers throughout the country, with a few minor exceptions. The code adopted the 1 percent tolerance on all freight, minimum 500 pounds, except on freight loaded in open cars the tolerance was made 1 percent with a minimum of 1,000 pounds. The Commission indorsed the rules, subject to the right to inquire into the legality and reasonableness thereof. This code is referred to by the Commission in its report in *Weight Tolerance Rule*, 192 I.C.C. 71, at pages 72-73.

tariffs are for the purpose of adjusting claims for loss due to weight inaccuracies, and also to loss due to moisture, evaporation, or precipitation, and natural shrinkage inherent in the commodity transported.[17]

The Commission's experience with the egg damage problem dates back as far as 1913 when the railroads filed tariffs with it, applicable to the metropolitan district of New York, containing rules and regulations which provided, in substance, that where cases of eggs are received by the carrier at the shipping point and receipted for as in apparent good order, and if they arrive at destination in the same apparent condition (showing no external evidence of damage), the consignee had no right to examine the content of the cases prior to delivery.

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17. Tariffs on file with the Commission include the following, which are representative of a vast number of such tariffs:

Illinois Central R.R. Co., I.C.C. No. E-1877, Item 60—Coal.

B. & O. R.R. Co., I.C.C. No. 23872, Rule 20—Grain.

Southwestern Lines Tariff No. 188-F, Agent Kratzmeir's I.C.C. No. 3962, Item No. 540—Livestock.

Agent Prueter's Eastbound Lumber Tariff I.C.C. No. 1531, Item 685—Lumber.

Federal Barge Lines, Inc., I.C.C. No. 45, Item 310—Grain and Soya Beans in bulk in bargeloads.

Phillips Pipe Line Company, I.C.C. No. 37, Item 25—Propane by pipe line. Deduction for evaporation.

B. & O. R.R. Co., I.C.C. No. 24079, Rule 8—Carload Freight.

Agent C. A. Spaninger's I.C.C. No. 1445—Carload Freight.

Agent W. J. Prueter's I.C.C. No. A-3899, Item 70—Carload Freight.

Agent W. J. Prueter's I.C.C. No. A-3970, Item 175—Celery.

but was required to give the carrier a receipt for the shipment as being in apparent good order. In *New York Mercantile Exchange* v. *B. & O. R.R. Co.*, 36 I.C.C. 156 (1915), certain consignees filed a complaint with the Commission seeking to have the above referred to tariff rules declared unjust, unreasonable and unduly prejudicial to the locality of New York and the egg merchants thereof. The Commission found from the evidence presented by the complainants that such rules and regulations were not unjust, unreasonable or unduly prejudicial.[18]

In *National Poultry, Butter & Egg Assn.* v. *N.Y.C.R.R. Co.*, 52 I.C.C. 47, decided January 21, 1919, the Commission approved a tolerance rule in connection with damage claims on shell eggs, which is the same kind of a rule as the one approved in the instant case. Under the rule approved in that case,

[18] In its decision in that case the Commission referred to the fact (p. 160) that the complainants admitted that it was impracticable to have a complete inspection of all cases of eggs arriving in the metropolitan district of New York, and that the complainants suggested that where external evidence of damage was not in evidence an inspection of from 10 to 15 cases per car of approximately 300 cases would suffice.

In reaching its decision that the challenged tariff rules were not unlawful the Commission considered and relied upon a report of an investigation made by an agent of the Food Research Division of the Department of Agriculture showing that in 61 experiments, conducted by that Department, there were 19.22 eggs per case of 30 dozen leaving the packing house that were partly damaged; that in addition to this number there were 11.28 eggs which could easily become No. 1 cracks because of defective shells as laid by the hen, or a total of 30.50 defective eggs in each case; and that breakage in transit averaged between 5.59 and 5.80 eggs per case. (P. 161.)

which remained in effect until July 24, 1948, consignees were permitted to lift the lids of 25 percent of the cases, not exceeding 20 in one shipment, and examine the top layers for damage. If damage to eggs was disclosed by such inspection, the rule permitted further examination of the top layers of the other crates selected by the consignee. All cases containing damaged eggs were set aside for reconditioning. Except as to "storage packed eggs, storage packed dirties, and rehandled and repacked eggs," if not more than 5 percent was damaged no claim would be allowed. However, if the damage exceeded 5 percent claims were allowed for all damage in excess thereof, if the examination developed carrier liability. In regard to the storage packed and rehandled and repacked eggs claims for actual damage would be allowed if carrier liability could be established.

Under the regulations which became effective July 24, 1948 (Appendix B to the Commission's Report, R. 46), provisions were made for inspection of shipments quite similar to those published pursuant to the Commission's findings in the *National Poultry, Butter & Egg Asso.* case. However, the tariff containing the regulation provided that the descriptions "rehandled and repacked" and "storage packed eggs" shall apply only to eggs rehandled and repacked, and graded and sorted at packing plants or storage warehouses located at point of origin of the rail shipment. The terms "current receipts" or "graded" applied to eggs

not complying with the foregoing descriptions.[19] These regulations afforded some measure of relief from the excessive claim payments but the claims received and payments thereof by the railroads continued to be inordinate.

In the instant case the tariff regulations filed by the carriers, pursuant to the Commission's decision and order which are here under review, are somewhat similar to the regulations of 1919 and 1948. These regulations (R. 1286-13) authorize the opening by consignees of each package in the shipment, as compared to the opening of not to exceed 20 cases under the former regulations. They add the 3 percent tolerance on eggs packed at rail point

[19] In the 1919 regulations "rehandled and repacked" and "storage packed eggs" on which claims for actual damages had been allowed, were not restricted to shipments handled and repacked, and graded and sorted at the point of origin of the rail shipment. Such described shipments could originate at points other than the point of the rail shipment and could be handled to that point by truck. As a result eggs not originating at point of origin of the rail shipment, but which previously had been included in the description "rehandled and repacked" and "storage packed eggs" were now included in the terms "current receipts" or "graded" eggs. If an examination of the top layer of 25 percent, with a maximum of 20 cases, showed 5 percent or less damage, it was considered complete and final for the entire shipment, and a good order receipt was required of the consignee. Under the July 24, 1948, regulations, claims for actual damage applied only on rehandled and repacked and storage packed eggs when such operations were performed at point of origin of the rail shipment. On eggs of all other descriptions the carriers were to pay no claims when the examination showed the damage was 5 percent or less. (R. 16, 43; Appendix A to the Commission's report.)

of origin, but retain the 5 percent which is made applicable on all eggs packed at off rail points. The regulations contain the further provision that the 3 and 5 percent tolerances do not apply when the shipper furnishes a Federal or State inspection agency certificate showing point of origin damage to be other than 3 and 5 percent, respectively. In such cases the percentage of actual damage as shown on the certificates, plus 1 percent to cover damage in transit due to the inherent nature of the eggs, shall be used.

It will be observed that under the 3 and 5 percent tolerance rule involved in this appeal that a shipper is not bound by the rule as he is given an alternative of having the exact amount of damaged eggs determined immediately prior to their delivery for rail transportation. The alternative thus afforded is similar in principle to the released value rule approved by the courts in numerous cases including *Adams Express Co. v. Croninger*, 226 U. S. 491, 509-512; *Missouri, K. & T. Ry. Co. v. Harriman Bros.*, 227 U. S. 657, 672; *Cincinnati, N. O. & T. P. Ry. v. Rankin*, 241 U. S. 319, 327; *Union Pacific R. R. Co. v. Burke*, 255 U. S. 317, 321; *Simmons Hardware Co. v. Southern Ry. Co.*, 279 F. 929, 932, certiorari denied 260 U. S. 739.

It is believed clear that the common law did not prohibit a shipper and a carrier from entering into an agreement whereby the carrier may exempt itself from losses not caused by it. In *York Company v. Central Railroad*, 3 Wall. 107, 113, and in *San Chicago Ry. v. Rheinstrom Co.*, 294 U. S. 494, 496, the Supreme Court held that a carrier may exempt

itself by contract from liability for damages which were not caused by it and were beyond its control.

IV

Tolerance Rules for Grading of Shell Eggs Have Been Employed for a Number of Years by the United States Department of Agriculture, the Department of the United States Army, and the Egg Industry

We have already pointed out p. 30, *supra*, the Department of Agriculture has adopted tolerance rules in the grading and inspection of eggs and has used such rules for a number of years. (R. 342). The producers and shippers of eggs likewise have adopted such a rule with respect to shell damages to eggs shipped by them (R. 241).

The Department of the Army also has adopted a tolerance in the inspection of eggs purchased by it, which is similar to that of the Department of Agriculture. (R. 406).[20]

[20] A witness for the Department of the Army testified that in the inspection by that Department, eggs purchased for export, designated as Quartermaster Market Grade I, (requiring 80 percent Grade A, with up to 15 percent Grade B) permits a tolerance of 5 percent which "can be stains, checks, leakers, broken eggs and loss." (R. 406). Another Army witness later testified that the 5 percent tolerance includes Grade C eggs, checks and stains, but no leaker loss is allowed after the price is fixed on the purchases, except a nominal loss of 3/10 to 5/10 of 1 percent. He also stated that on export eggs there is a stipulation that not over 3 percent of checks will be allowed at origin, or 4½ percent at destination. (R. 613).

On eggs purchased for domestic use requiring 60 percent Grade A, the Army permits a tolerance of 10 percent. (R. 406). The 5 percent tolerance on the higher grades allows for shell damage of 4½ percent checks and stains and ½ percent leakers (R. 407). "All eggs purchased by the Army are those that have been rehandled or repacked at the point examined." (R. 408).

The tolerance rules on eggs are predicated on their perishable and fragile nature and the recognition by the experts who deal in them that there is a normal expectancy of shell damage even in the grading and packing of the eggs, as well as in their transportation. The evidence before the Commission contained testimony that the normal expectancy of damage to eggs starts at the nest and dependent upon the strength of the individual shell, continues progressively until the egg is used by the consumer. (R. 241). Also in the grading and inspection of eggs it is impossible to eliminate every checked or cracked egg from a case. (R. 343). The evidence heretofore reviewed is uncontroverted that such damage exists in shell eggs even before transportation begins. It is significant that Henry G. Hamann, Chief of the Dairy and Poultry Inspection Division, Production and Marketing Administration, United States Department of Agriculture, stated that he was "very definitely" of the opinion that there should be a tolerance on shell eggs shipped by rail into New York (R. 357) and that its Mr. Shilt testified if the railroads did not create the damage they should not have to pay for it (R. 651).

V

The Courts Have Approved Tolerance Rules as a Uniform Method of Removing Damage Claims for Which the Railroads Are Not Responsible

The Commission found (R. 19) that the regulations governing tolerance on shipments of shell

eggs were established as a means of determining the amount of damage existing at the time the shipment is received by the carrier and the amount of damage resulting solely during transportation because of the inherent nature of the shipment. Therefore, where, as here, the evidence is conclusive that there is always a certain amount of damage to a shipment of eggs prior to (R. 240, 342-346, 351, 363, 370-371) and during the course of transportation (Pl. Ex. 22; R. 1130, 365) which cannot be avoided, it is necessary to establish a standard or a tolerance limit for which the railroads will not be held liable.

The courts have found that such a rule is not only reasonable and just, but is a practicable way of fixing liability for damages to shipments of goods.

Leonard v. *Pennsylvania R. Co.*, 15 F. Supp. 55 (D. C. S. D. N. Y.) (1936), involved alleged damages to a shipment of watermelons. The court, in passing on the question of railroad liability for damage to the shipment, found from the evidence in the case that from 90 to 95 percent of carload shipments of watermelons, loaded by the shipper in bulk in rail cars, showed a shifting of the cargo when transported for any considerable distance, resulting in some of the melons being bruised. It further found that the evidence showed a damage or loss in most cases was within 2 percent of the melons transported. The Court denied recovery in that case because the involved shipment came within this 2 percent tolerance (p. 56).

In *Bronstein* v. *Baltimore & O. R. Co.*, 29 F. Supp. 837 (D.C. E.D. Pa.) (1939), suit was brought to recover damages for injury to 76 carloads of watermelons transported from Georgia to Philadelphia. The evidence showed that although the melons had been carefully loaded by the shipper and were in good condition when placed in the cars, that upon arrival at destination every carload showed a certain amount of damage, consisting principally of cracks and bruises caused by jolting, jarring, bumping, stopping and starting of the cars during transportation. In the decision of the case, the Court stated (p. 839) that:

> Since both parties agree that when watermelons are loaded in bulk and transported by rail over long distances there will always be a certain amount of damage which can not be avoided even by the most careful handling, it is necessary to fix a norm or limit of tolerance, within which the presence of damaged melons in the cars will not amount to proof of negligence. * * *

In its disposition of the case the Court fixed a tolerance for ordinary non-negligent handling of the bulk shipments at 25 for the long, tougher type of melon and 40 for the round, more fragile type. *Ibid.*

On the same day that the court decided the *Bronstein* case it decided the case of *Meltzer* v. *Pennsylvania R. Co.*, 29 F. Supp. 840, in which it fixed the same amount of tolerance for damage to the ship-

ments of watermelons involved in the *Bronstein* case, stating (pp. 842-843) that:

> Another deduction will also have to be made. It is not possible to transport a carload of watermelons any considerable distance without some shifting of the load and some amount of damage. This must be taken into consideration, because it means that a certain amount of injury can not be charged to the defendant's negligence. I fixed this normal expectancy of limit of tolerance, in the Bronstein case at twenty-five for the long melons, and forty for the round ones. The testimony in this case is much the same and I will take the same standard. * * *.

One of the latest court cases fixing a tolerance rule, as a method of removing from claims damages for which the rail carriers are not responsible, is *National Distillers P. Corp.* v. *Companhia Nacional*, *etc.*, 107 F. Supp. 65 (D.C. E.D. Pa). (1952). In this case the Court found that the evidence established there is a normal shrinkage of wine, in wooden containers, and that an allowance of 2 percent for such shrinkage was proper and would be permitted in connection with a shipment of wine transported by the Reading Railroad Company from Philadelphia to Brooklyn, N.Y. (p. 70).

The order of the Commission in the instant case assures of uniformity in determining the limit of tolerance on damages to shell eggs which is in complete harmony with the purpose of Congress in delegating to the Commission the duty of securing

equality of rates. *New Haven R.R.* v. *Interstate Com. Com.*, 200 U.S. 361, 394.

It is submitted that one of the reasons Congress had in mind in the establishment of the Commission was to assure uniformity in the regulation of interstate transportation of carriers for hire. The egg tolerance rule approved by the Commission is consistent with that purpose.[21] It provides the only practicable method of determining the damages existing in the eggs prior to their transportation, and the elimination from claims the damages which are due to their inherent nature. It is a reasonable and just regulation and does not conflict with the statutory requirements and applicable decisions of the courts. It rests upon a reasonable and rational basis as the finding and evidence show.

VI

The Commission's Order Is Based Upon Adequate Findings Which Are Supported by Substantial Evidence on the Record as a Whole

Appellants contend to the contrary. (Br. Utah Poultry, p. 56).

In regard to the question of whether the findings are adequate, we respectfully submit that the Com-

[21] This Court held in *American Trucking Assns.* v. *United States*, 344 U.S. 298, 309-12, that the Commission has jurisdiction to issues rules and regulations to implement the purposes of the Act despite the absence of specific authority. *United States* v. *Pennsylvania R. R.*, 323 U.S. 612, 645. The Commission's knowledge and experience of transportation conditions, recognized by the courts, qualify it to determine the reasonableness of such regulations. *Rochester Tel. Corp.* v. *United States*, 370 U.S. 125, 128; *McLean Trucking Co.* v. *United States*, 321 U.S. 67.

mission has made all the findings that are necessary or that it could reasonably be expected to make in the premises. It is not believed necessary to make any detailed analysis of the findings since a casual reading of the Commission's decision will reveal that they are entirely adequate (R. 26, 31-32, 43).

1. It is contended (Br. Secretary of Agriculture, p. 34) that the facts found by the Commission "cast a cloud over its premise that tolerances provide a reasonable means of solving the problem of damage claims" to eggs because of (1) the difference in such claims on the eastern seaboard and elsewhere, and (2) the finding that similar claims are negligible for eggs transported by truck. This contention is based upon the finding in the Commission's report (R. 30) that the record "establishes conclusively that the damage claims on shipments of eggs to points in eastern seaboard territory, particularly New York, proportionately exceed in number and amount those at any other point in the country;" and the finding (R. 39), that "The record indicates that in the transportation of eggs by motor truck the amount of shell damage is negligible."

It is submitted that the above findings do not conflict with the other subsidiary findings made by the Commission or its ultimate finding that "tolerances of 3 and 5 percent, respectively, would be reasonable." (R. 43). The uncontroverted fact is that damage exists in shipments of eggs tendered to the railroads for transportation regardless of the intended destinations. As heretofore shown, the

Commission found and the facts show that the condition of a damaged egg never gets better, but worsens with handling and in transportation, and that such eggs cause damage to others which had been sound (R. 42). The fact that damage claims on egg shipments to points in the United States, other than to the eastern seaboard territory, were less than that at destinations in the latter territory, does not in any way conflict with other findings made by the Commission or detract from the reasonableness of the tolerance prescribed.

Neither does the finding that the record indicates the damage to shipments handled by truck is negligible, prove that the authorized tolerances are unreasonable. The circumstances surrounding the shipments by truck and the method of adjusting damage claims are different from those employed by the railroads. There are no rules of inspection (20 case rule) for motor carriers as applied to rail carriers. Motor carrier rules are not involved here.

2. In regard to the contention of appellant Secretary of Agriculture (Br. p. 37) that the Commission's finding as to damages resulting from "inherent vice" is not supported by any adequate finding or evidence, and is "directly contrary to the Commission's findings on the same subject in 1919", (*National Poultry, Butter & Egg Assn. v. N.Y.C.R. Co.*, 52 I. C. C. 47), it is submitted that such a contention is without merit. In any event the decision and findings in the instant case are based upon a different investigation and record. The

question here is: does the record in this case justify the findings. The Commission's judgment is to be exercised in the light of each individual case. The courts are not concerned with the Commission's reasoning or with the consistency or inconsistency of its decisions. *Western Chem. Co. v. United States*, 271 U.S. 268, 274; *Virginian Ry. Co. v. United States*, *supra*, 665.

3. In regard to appellants' contention (Br. of Secretary of Agriculture, p. 38) that the Commission's approval of a 1 percent tolerance to cover the normal expectancy of eggs damaged during the course of transportation (due to their inherent nature), is not predicated on any finding or evidence that such damage occurs, we respectfully submit that the Commission has made such finding which is supported by substantial evidence.[22]

In discussing the evidence of damages found to exist in specific carload shipments of eggs from Midwestern points and from points throughout the United States at the time the cases were loaded into the cars for transportation and the amount of dam-

[22] The 1 percent tolerance is based upon the tariff rule approved by the Commission which provides that where bona fide certificates of Federal or State inspection agencies showing the actual extent of damages to eggs determined at rail point of origin of the shipment (before transportation begins) there will be added to such damage one percent for further damage in transit, and the total thus computed may be deducted from the claim against the railroad for damages found to exist at destination for which the railroads might be liable.

ages found to exist in the identical cases at destination, the Commission found (R. 31) that:

> * * * a careful inspection made of the eggs as they were loaded into 115 railroad cars in 1948 and 1949 at points in the midwestern area, disclosed that they contained an average of 1.4 percent stains and dirties, 1.9 checks, and 0.1 designated as loss. The 1.9 percent checks were, however, found by candling and clicking, and could not be detected by the kind of inspection performed at New York. An examination of those identical shipments at destination showed respective damage of 2.1, 2.7, and 0.3 percent, reflecting increases of 0.7, 0.8, and 0.2 percent, respectively, incident to the movement in transit. Similar inspection in 1948, of 737 carloads of eggs loaded at origin points throughout the entire country, showed an average of stains and dirties of 1.8, checks of 1.9, and loss of 0.2 percent. The result of these inspections indicates an average damage of 3.4 percent at origin and 5.1 percent at destination, and typifies the character of eggs which are loaded into railroad cars at points of origin. It also establishes that there is a normal expectancy of shell damage in every car loaded with eggs, and that it is at least impractical to load a perfect car.

As hereinbefore shown, the evidence supports the above finding.

The regulations approved by the Commission

furnish the shipper an opportunity of showing the actual damage to eggs prior to the time the shipments are made, or as an alternative to be bound by the tolerance provided for in the tariffs. This is quite similar to the released value rule approved by the Court in *Pennsylvania R.R. Co.* v. *Hughes*, 191 U.S. 477, 478; *Adams Express Co.* v. *Croninger*, *supra*; *Adams Express Co.* v. *Darden*, 265 U.S. 265.

4. Perhaps a word should be said with respect to appellant's contention (Br. Secretary of Agriculture, pp. 16, 35) that the Commission's order is defective in that it has nationwide application while the greater part of the evidence and the findings relate to damages resulting to eggs shipped to destinations in trunkline territory (on the eastern seaboard), and particularly to New York. This contention was disposed of fully by the opinion below (R. 113) where the Court stated:

> It is not unjust to apply the regulation nationwide. A shipper whose eggs suffer no damage is not hurt. The tolerance applies only if there is damage. If throughout the nation relatively small claims of damage were made by some shippers it would follow that there would be comparatively small or insignificant reductions under the regulation. And, it is a reasonable assumption from the Commission's exhaustive factual studies that generally some amount of damage was in the crates at the time they were delivered to the carrier.

A witness for the Department of Agriculture testified that the studies made by that Department of the 115 carloads of eggs shipped from the mid-west, and that covering 737 cars from all parts of the country would, "we hope," be typical of eggs in the entire country. (R. 370).

In the *Assigned Car Cases*, 274 U. S. 564, the Supreme Court overruled a claim similar to the one made here in the following language at page 583:

> * * * The claim is that the evidence, upon which the finding of the resulting discrimination in these other transportation facilities rests, relates to only a few carriers, and that the general finding to that effect is without support, because the evidence introduced was not shown to be typical. Compare *New England Divisions Case*, 261 U. S. 184, 196-197; *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, 291. The argument overlooks the difference in the character between a general rule prescribed under paragraph (12) and a practice for particular carriers ordered or prohibited under §§ 1, 3 and 15 of the Interstate Commerce Act. In the cases cited, the Commission was determining the relative rights of the several carriers in a joint rate. It was making a partition; and it performed a function quasi-judicial in its nature. In the case at bar, the function exercised by the Commission is wholly legislative. Its authority to legislate is limited to establishing a reasonable

rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general.

To the same effect is the holding of the Supreme Court in the *New England Divisions Case*; 261 U.S. 184, 197. There the Supreme Court had under consideration contentions with respect to the nature of the evidence in support of a Commission order dividing joint rates between groups of rail carriers. The Court pointed out that the order was based on evidence which the Commission had a right to assume was "typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier." That method of proof was found to be the Commission's common practice in adjudicating comprehensively upon substantially all rates in a large territory, and that the actual necessities of procedure and administration had led to the adoption of that method also in passing upon the reasonableness of proposed rate increases. That method was found equally appropriate in passing upon multitudes of divisions of joint rates. That it has similar application in a comprehensive case such as here where the Commission is called upon to promulgate regulations nation-wide in character, is equally clear. This Court held in the

New England Divisions Case, supra, that there was no constitutional obstacle to the adoption of the method pursued and that only in that way could the task be performed.

5. Appellants further contend (Br. Secretary of Agriculture, pp. 38-39) that the Commission had departed from the facts disclosed in its report in finding reasonable a 3 percent tolerance on eggs packed at rail point of shipment and also reasonable a 5 percent figure for shipments packed at points other than rail origin points, and that there were no findings which would support the higher percentage of tolerance with respect to the cases packed at off-rail points. This contention is based on the assertion that the Commission's report indicates "that there is no difference in packing procedures or standards between packers at off-rail points and those located on the railroad."

Actually what the Commission said in its report (R. 30) was that "all egg packing plants are operated in substantially the same manner and according to the same competitive standards." This statement is somewhat different from that made by appellants. In any event the eggs covered by the 5 percent tolerance includes all the rehandled and repacked eggs which are visually inspected (not candled) as well as any that are candled and "clicked", and also includes the "current receipt" eggs and those graded by the farmer (with less rigorous inspection standards than those applied by the packer) which admittedly are not shipped commercially in "substantial" quantities. It is, therefore, submitted that the findings and the evi-

dence reflect the distinction between the eggs packed at rail point of origin and those packed at other than rail point of origin and warrant the difference in the percentage of tolerance approved. The difference between the 3 percent and 5 percent tolerance is reasonable and is based on adequate findings and substantial evidence.

It is respectfully submitted that the Commission's report sets forth detailed findings of fact which naturally support its order. As this Court has often stated, it is not necessary that formal findings be made, except where damages are awarded as provided in Section 14(1) of the Act. All the Commission is required to do in a case of this sort is to set forth in its report such basic or quasi-jurisdictional subordinate facts as will enable a reviewing court to determine how the ultimate conclusion was reached. It has done so in the instant case. *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457, 487; *Alabama G.S. R. Co.* v. *United States*, 340 U.S. 216.

Reviewed in the light of the principles established in the above cases, it is submitted that the contention of appellants as to the inadequacy of the findings is without merit.

VII

The Commission's Order Does Not Limit or Preclude a Shipper's Right to Recover the Full Actual Loss or Damage to His Property in Violation of Section 20(11) of the Act

Appellants further contend (Br. Secretary of Agriculture, 14, 24-25) that the Commission's order

is invalid because it would limit or preclude a shipper's right to recover the "full actual" loss or damage to his property under Section 20(11), since such loss or damage under the approved tariff rule would be determined at the time and place the eggs were shipped instead of the value at destination." This contention is based on the decision of this Court in *Chicago, Milwaukee & St. Paul Ry. Co. v. McCaull-Dinsmore Co.*, 253 U. S. 97, 99, where it was held that the shipper was entitled to damages on the basis of value at the place of destination if that be greater than the value at place and time of shipment. That case is distinguishable for the reason that in the instant case damages in the amount of the approved tolerance already existed at the time the eggs were delivered to the railroads for transportation for which they were in no way responsible.

As we have heretofore shown the purpose of the regulations is to remove from a damage claim that portion of the damages for which the railroads are not liable. We submit that the time to determine this sort of damage to a shipment is when it is delivered to a carrier for transportation. In no other way could it be determined—certainly not at destination. The rule was designed to make certain such damage. The necessity for such a rule is clearly within the provisions of Section 1(6) of the Act which specifically requires common carriers to establish reasonable rules, regulations and practices relating to "receiving, handling, transporting, storing, and delivery of property"

which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms."[23]

That the *McCaull-Dinsmore* case is distinguishable from the instant case is shown by the opinion of the Court of Appeals, 260 Fed. 835, page 836, where it pointed out that the purpose of the provisions of the bill of lading there involved "was not to introduce certainty, but to avoid the rule of existing law, for the obvious object of escaping a higher valuation which would often arise at destination." This Court observed in its decision of the *McCaull-Dinsmore* case, *supra*, p. 100 (on appeal), that the rule of common law "is not an arbitrary fiat", but an embodiment of "the plain fact that actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed."

Jos. Toko Co. v. Lehigh V. R. Co., 12 N.J. 608, relied upon by appellants, is to be distinguished from the case at hand. The appellants indicate (Br. Secretary of Agriculture, p. 33) that a moisture evaporation rule was condemned. This is difficult to understand because the Court there observed, without disapproval, at p. 614, that the "carrier

[23] The provisions of Section 20(11), of the Act do not stand alone but must be considered in the light of other provisions of the Act, including Section 1. The technical construction of one portion of the Act may not be relied upon to justify the violation of other provisions. *Manufacturers Assn. of York, Pa. v. P. R. R. Co.*, 107 I. C. C. 219; see also *Arkansas Fertilizer Co. v. United States*, 193 F. 667, 670-671.

deducted a 'water allowance' before recording the net weight" of the coal.

The *Toker* case is based upon the assumption that loss in the weight of coal at destination is equal to corresponding loss of substance of coal. A more reasonable approach is recognition of the fact that a loss in weight may occur without any loss of corpus due to natural causes and human limitations. Nevertheless, the main issue in that case was the proof of whether there was in fact a loss at destination. We have no such problem because here the extent of damage at destination can be ascertained by inspection. A weight tolerance is not applied to an actual loss because its place is in computing the actual loss. On the other hand, a damage tolerance is applied to actual damage because its purpose is to determine what amount of such damage is due to the inherent nature of the goods. It is submitted that the *Toker* case is not in point, and, in any event, is not binding upon this Court.

It is submitted that there could not be a breach of the contract with respect to damages which existed in the shipments of eggs prior to the time they were delivered to the railroads.

In this same connection appellants contend (Br. Secretary of Agriculture 15, 26) that the tolerance rule is based on "averages" or "normal expectancies" and that a shipper who carefully packs eggs and "ships perfect eggs," which are damaged due to the fault of the carrier, the application of the rule would violate Section 20(11) of the Act in that

it would relieve the carrier of paying for the full actual loss.

Our answer to this contention is that the rule is not proscribed by the Act. In the first place the rule or regulation does not relieve the carriers from damages caused by them. It merely prohibits carriers from having to pay for damages due to the inherent nature of the property. The Commission found that the tolerance rule "merely establishes a means to determine the amount of damages existing at the time the shipment is received by the carrier and the amount of damage resulting solely during transportation because of the inherent vice in the eggs." (R. 18-19.)

As we have heretofore shown, the uncontroverted evidence establishes the fact that eggs are in a damaged condition at the time they are received by the railroads for transportation; that they are highly perishable and fragile and a certain amount of damage occurs to them during grading and packing operations; and that the slightest movement in transportation may cause additional damage which could not be imported to the negligence of the railroads but rather to the vice of the commodity.

The tolerance rule provides the only feasible way of determining the condition of the eggs when they are received for shipment.

We submit that there is nothing novel about the use of "averages." Insurance companies use them. As a matter of fact rate making bodies, including the Interstate Commerce Commission, have for years employed the factor of loss and damage

claims in arriving at what would be a just and reasonable rate. This factor is based on averages of such claims and a shipper who has no claims or a few claims has to pay a rate based on such average the same as the shipper whose claims might be numerous. No objection to the use of this factor in determining rates has been made as far as can be ascertained. It is the only feasible way it can be used in constructing a rate." This principle seems to be similar to the tolerance rule here insofar as it is based on "averages." The Commission has for years dealt with tolerance rules in providing a uniform method of removing from damage claims that part which is not caused by the railroads and for which they are not responsible. The method used promotes the elimination of unjust discrimination, as well as the payment by carriers of involuntary rebates. The tolerance rule here approved by the Commission, and upheld as valid by the court below, does not transcend the provisions of Section 20(11).

CONCLUSION

For the reasons hereinbefore stated, it is submitted that the judgment of the District Court should be affirmed and the order of the Commission sustained.

Respectfully submitted.

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Interstate Commerce Commission.

SEPTEMBER, 1955.

APPENDIX A

Pertinent Provisions of the Statute

National Transportation Policy

[*Added September 18, 1940.*] [*U. S. Code, title 49, notes preceding secs. 1, 301, and 901.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Sec. 1(6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation,

with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

SEC. 6(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed

as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

SEC. 13(2). Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this part, or concerning which any question may arise

under any of the provisions of this part, or relating to the enforcement of any of the provisions of this part. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this part, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Representatives of State commissions, sitting with the Commission, under the provisions of this section, in cases pending before the Commission, shall receive such allowances for travel and subsistence expense as the Commission shall provide.

SEC. 15(1). That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in

violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Section 20(11). That any common carrier, railroad, or transportation company subject to the provisions of this part receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within

the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed, and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared

to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this part to regulate commerce, as amended; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the Commission is hereby empowered to make such order

in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court only in a State through or into which the defendant carrier operates a line of railroad: *Provided further*, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further*, That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further*, That the liability imposed by this para-

graph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this part provided.

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